Yap Chui Kui & Anor (administrators of the estate of Ho Ho Shen, deceased) v Dato' Low Nam Hui & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–1663 OF 2011

ABDUL WAHAB PATAIL, CLEMENT SKINNER AND LIM YEE LAN JJCA

15 JANUARY 2014

Civil Procedure — Appeal — Facts, finding of — Whether inferences of fact made by trial court on evidence inseparably linked to assessment of credibility of witnesses — Whether trial court had audio-visual advantage absent to appellate court — Whether appellate court should be slow to interfere with trial court's findings of fact unless findings were perverse or against weight of evidence

The appellants and the respondents were shareholders in Plenitude Holdings Sdn Bhd ('Plenitude'). The first appellant was also a director in Plenitude while the first and second respondents were, respectively, chairman and secretary of Plenitude and also directors and shareholders in the third respondent company ('LNH & Sons'). In an action filed in the High Court, the appellants alleged that without their knowledge and approval, LNH & Sons while representing that it was the registered and beneficial owner of all the issued and paid-up capital in Plenitude, entered into an agreement with another company, Cipriani, to sell all of the said issued and paid-up capital to the latter, and that subsequently, the respondents, with full knowledge of the antecedent manoeuvres by LNH & Sons, made a secret windfall by exchanging their Plenitude shares for substantially higher-priced shares in Cipriani. The respondents pleaded that the appellants' action was time-barred under s 6(1)(a) of the Limitation Act 1953 ('the Act'). The appellants, however, contended that their cause of action being based on fraud was protected by s 29 of the Act. The High Court held the action was time-barred and dismissed the claim prompting the instant appeal.

Held, dismissing the appeal:

(1) In the absence of finding of fraud, limitation applied. Without the inferences of fact sought and relied upon by the appellants, their cause of action necessarily failed (see para 14).

(2) The High Court had not only assessed the credibility of the witnesses material to the respective versions given by the appellants and the respondents, but had also considered the inferences of fact drawn from such assessment in carrying out a comprehensive judicial appreciation of

the facts. The trial court found it difficult to accept the appellants' version of events. As the grounds of decision of the High Court demonstrated, the inferences in this case were inseparable from the assessment of credibility in which arena the trial court had an audio-visual advantage. An appellate court should be slow to interfere with findings of facts by the trial court unless those findings were perverse or against the weight of the evidence (see paras 9 & 13).

[Bahasa Malaysia summary

Perayu-perayu dan responden-responden adalah pemegang-pemegang saham di dalam Plenitude Holdings Sdn Bhd ('Plenitude'). Perayu pertama juga adalah pengarah dalam Plenitude sementara responden pertama dan kedua adalah masing-masing pengerusi dan setiausaha Plenitude dan juga pengarah-pengarah dan pemegang saham di dalam syarikat responden ketiga ('LNH & Sons'). Dalam tindakan yang difailkan di Mahkamah Tinggi, perayu-perayu mendakwa bahawa tanpa pengetahuan dan kebenaran mereka, LNH & Sons mewakili bahawa ia adalah pemilik berdaftar and benefisiari kesemua modal berbayar dan terbitan dalam Plenitude, memasuki perjanjian dengan syarikat lain, Cipriani, untuk menjual kesemua modal berbayar dan terbitan tersebut kepada Cipriani, dan bahawa kemudiannya responden-responden dengan pengetahuan penuh mengenai pergerakan tersebut oleh LNH & Sons, membuat keuntungan rahsia dengan menukarkan saham-saham Plenitude mereka untuk saham-saham yang secara substansial harga lebih tinggi dalam Cipriani. Responden-responden memplid bahawa tindakan perayu tidak dihalang masa di bawah s 6(1)(a) Akta Had Masa 1953 ('Akta'). Perayu-perayu, walau bagaimanapun berhujah bahawa kausa tindakan mereka berdasarkan atas fraud dilindungi oleh s 29 Akta. Mahkamah Tinggi memutuskan bahawa tindakan tersebut adalah dihalang masa dan menolak tuntutan membuatkan rayuan ini dibangkitkan.

Diputuskan, menolak rayuan:

(1) Dalam ketiadaan dapatan fraud, had masa diguna pakai. Tanpa inferens fakta yang dipohon dan digunakan oleh perayu-perayu, kausa tindakan mereka semestinya gagal (lihat perenggan 14).

(2) Mahkamah Tinggi bukan sahaja menilai kebolehpercayaan saksi-saksi material kepada versi masing-masing yang diberi oleh perayu-perayu dan responden-responden, tetapi juga mempertimbangkan inferens fakta yang diambil daripada penilaian sedemikian dalam menjalankan penilaian kehakiman fakta. Mahkamah perbicaraan mendapati agak sukar untuk menerima versi perayu-perayu terhadap kejadian. Seperti ditunjukkan oleh alasan keputusan Mahkamah Tinggi, inferens dalam kes ini tidak boleh dipisahkan daripada penilaian kredibiliti yang mana mahkamah perbicaraan mempunyai kelebihan audio-visual. Mahkamah rayuan patut perlahan untuk campur tangan dengan dapatan fakta oleh

mahkamah perbicaraan kecuali dapatan-dapatan tersebut adalah menentang atau bertentangan beban keterangan (lihat perenggan 9 & 13).]

Notes

For cases on finding of facts, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1103–1238.

Cases referred to

Capital Insurance Bhd v Cheong Heng Loong Goldsmiths (KL) Sdn Bhd [2005] 6 MLJ 593; [2005] 4 CLJ 1, FC (refd)

Chong Sui Chuen v Yuen Lai Chun [1988] 1 LNS 28, SC (refd)

Mohamed Ismail bin Mohamed Shariff v Zain Azahari bin Zainal Abidin & Ors [2013] 2 MLJ 605; [2013] 2 CLJ 717, FC (refd)

Port Swettenham Authority v The Borneo Company (Malaysia) Sdn Bhd [1975] 2 MLJ 80; [1975] 1 LNS 125, FC (refd)

Song Lian Chye & Ors v Tai Kain Cheong t/a Tai Kian Cheong & Co [1983] 2 MLJ 222; [1983] 2 CLJ 128, FC (refd)

UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785, FC (refd)

Legislation referred to

Limitation Act 1953 s 6(1)(a)

Appeal from: Civil Suit No 22–289 of 2000 (High Court, Johor Bahru)

Alex Tan Chie Sian (Wong Kian Kheong) for the appellants.
Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the respondents.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] In their re-amended writ of summons originally filed on 25 May 2000, the appellants herein as plaintiffs pleaded, inter alia, that:

> 23 The plaintiffs plead that the defendants herein have wrongly and fraudulently represented to them the matters as set in paragraph 13 hereinbefore, upon which the plaintiffs placed reliance, thereby causing the plaintiffs to act in the manner as set out in paragraph 14 hereinbefore … (Particulars) …
>
> 24 The plaintiffs plead that amount paid to them as set out in paragraph 14 herein reflect a substantial loss to the plaintiffs that they were lawfully and rightfully entitled to by reason of which the plaintiffs have suffered loss and damage … (Particulars) …

[2] They sought reliefs in general damages to be assessed, special damages for

A the first and second appellants herein, full disclosure and discovery of the accounts indicating the amounts for which the shares in Plenitude Holdings were actually disposed by the third defendant, an order that the defendants do account to the plaintiffs for all the profits that they have benefited and/or derived in respect of the subsequent disposal of shares in Plenitude Holdings by B the third defendant and that the defendants are to pay the plaintiffs all the profits that the plaintiffs would have been entitled if the true value of the shares in Plenitude Holdings have been disclosed by the defendants to the plaintiffs, interests and costs and any other or further relief deemed fit and proper.

C **[3]** Briefly, the case for the appellants is that:

(a) the appellants were shareholders in Plenitude Holdings Sdn Bhd ('Plenitude'). The first appellant was also a director;

(b) the respondents were shareholders of Plenitude, and the first and second D respondents were chairman and secretary respectively of Plenitude and also directors and shareholders of the third respondent;

(c) the first and second respondents were authorised by the Board of Directors of Plenitude to arrange or deal with any party with a view to E better promote the development of Plenitude, even restructuring of the company;

(d) the first respondent agreed to pay for the recognition of his efforts in procuring the assets in Plenitude;

F (e) but subsequently it was discovered that:

(i) the third respondent represented to Faber Union it was the registered and beneficial owner of all the issued and paid-up capital of Plenitude and on 30 July 1992 entered into an agreement for Faber Union to hold 60% of the issued and paid up capital of G Plenitude for RM54m with RM5m to be paid to the first respondent and balance upon completion;

(ii) on 30 July 1992, the first respondent signed a deed of guarantee and indemnity with Faber Union to indemnify the latter;

H (iii) on 24 December 1992, the first respondent obtained the approval of the shareholders of Plenitude for the exchange of 5 million nominal RM1 shares for RM27m, without disclosing who was the purchaser;

(iv) the first appellant tendered his resignation as director of Plenitude at I the request of the first and second respondents by their letter 30 December 1992;

(v) on 29 December 1992, the third respondent entered into an agreement with Cipriani Sdn Bhd ('Cipriani') to sell all the issued and paid-up capital of Plenitude to Cipriani for RM44,799,997;

(vi) on 30 December 1992, the third respondent entered into an agreement with Faber Union for the latter to subscribe for shares in Cipriani;

(vii) on 30 December 1992, Faber Union did subscribe for a total of 45,200,000 shares in Cipriani for RM45.2m;

(viii) on 30 December 1992, another agreement was entered into between Faber Union and Cipriani, where Cipriani would use subscription fees of RM10.8m to pay its debt to the third respondent who agreed to be responsible for stamp duties exceeding RM2m for transfer of the Rumah Nanas Land to Plenitude;

(ix) on 23 April 1993, the third respondent entered into an agreement with Cipriani to amend their agreement of 29 December 1992; and

(x) on 23 April 1992, the third respondent, Cipriani and Faber Union agreed to amend their agreement of 30 December 1992.

(f) The appellants pleaded these arrangements were made without the appellants' knowledge, authorisation, approval and/or consent.

[4] The defence was that the respondents, at all material times, knew fully all the circumstances of the transactions leading to the exchange of their Plenitude shares for the Cipriani shares which they sold and received full payment therefor, and at all material times, they never made any complaint whatsoever over the past six years:

(a) the respondents knew fully their shares in Plenitude were to be exchanged for a greatly enhanced value in the Cipriani shares;

(b) the respondents received substantial financial gains on the transaction of their shares in Cipriani Sdn Bhd;

(c) the respondents denied the alleged particulars asserted by the appellants and the figures thereunder are the misconceived figures;

(d) the respondents were fully aware of the letter of 7 April 1993 which listed the final allotment of the shares;

(e) The claim is barred by s 6(1)(a) of the Limitation Act 1953.

[5] After a full trial, the High Court dismissed the appellants' claim. Though not germane to this appeal, the respondents' counterclaim was also dismissed.

[6] A 91 page written submission, and oral submissions just over an hour, and a 15 minute reply at the end, strongly reargued the appellants' version of their case. The respondents submitted a 33 page written submission, a 3 page further written submission, and made oral submission of just over 45 minutes.

[7] We begin by addressing the issue of limitation. It was submitted for the respondents that the appellants' case is barred by s 6(1)(a) of the Limitation Act 1953. It was submitted for the appellants that their cause of action was based in fraud and their cause of action is protected by s 29 of the said Act. Thus, the High Court erred when it held that the appellants' action was time barred.

[8] In our view, limitation is a non-issue. To put it simply, if the appellants' version of facts and of inferences to be drawn were accepted, there is a finding of fraud and their claim would not be time barred. On the other hand, if the appellants failed to persuade the court upon their version, and therefore there is no finding of fraud, then the action commenced only towards the end of May 2000 is prima facie time barred. Though the High Court did not sum up the issue in these terms, it is clearly in the mind of the High Court when it said:

> Having stated the above, it is important to bear in mind that the circumstances under which the plaintiffs had obtained the 8 agreements are crucial to the plaintiffs' contention that this action is not time barred.

[9] We came to this conclusion because the High Court had properly proceeded to set out what it deliberated upon. The High Court held that the first appellant's version as to the manner he had knowledge and came into possession of the eight agreements was not credible and could not be believed. The High Court set out its reasons. The High Court considered and found PW2 under cross-examination was unable to give rational and consistent answers as to when and whom he approached while making inquiries as to the eight agreements. The High Court also found that PW2's version that he did not have the time to telephone the first appellant after allegedly finding the documents in or about March 1997 in a brown envelope tied with a rafia rope and left in front of his house and could only pass them to PW3 some ten months later because he was extremely busy with his work and was always on the move, did not quite fit in with PW2's story that he went to Rumah Nanas and Plenitude to make inquiries about the documents. The High Court took the view that the appellants' version regarding the circumstances under which the eight agreements were obtained were not credible as well as not probable, and found it difficult to accept the appellants' version.

[10] The High Court considered the statement by the first appellant in his witness statement that when proceeding to cash their cheques on 26 May 1993, the broker who accompanied them informed them that they made large profits since Faber paid RM5m to Plenitude, which was received by the first respondent upon execution of the sale and purchase agreement in respect of the sale of the land in question, thus raising suspicion of undisclosed gains by the first respondent. We cannot fault the reasoning of the High Court that if this were so, it is certainly not unreasonable to expect the appellants' to have taken

proactive steps to inquire about the suspicion, and the conclusion that because: A

(a) there is internal inconsistency in their conduct; and

(b) the contemporaneous conduct of silence coming from a person like the first appellant who is very literate and aware and assertive of his legal rights and at all times legally represented was most strange and unusual, B

the High Court rejected the appellants' version that they were aware of the eight agreements only in early 1998.

[11] The High Court went on to consider the evidence of the second respondent that he had personally photostatted the agreements and gave them to the first appellant, and the evidence of the second respondent was supported by the evidence of DW2. C

[12] We observe also that the High Court took into consideration inter-alia that the first appellant is both highly qualified and literate, fluent in both English and Mandarin, with impressive academic and business credentials, with a basic degree, a post graduate degree and a doctorate, with vast business experience, starting with brick factory business to housing development, and had engaged with big names in the development industry. We cannot find error with the reasoning that with such background, the first appellant would have quickly become suspicious if there was anything improper about the transactions. D E

[13] The High Court had not only made an assessment of the credibility of the witnesses material to the two versions, but also the inferences of fact drawn from that assessment in the process of a comprehensive judicial appreciation of the facts. As the grounds of decision of the High Court demonstrated, the inferences in this case was inseparable from the assessment of credibility where the High Court had an audio and visual advantage. Hence, it has been said that an appellate court should be slow to interfere with findings of facts unless the findings made by the trial court are perverse or against the weight of evidence: *Port Swettenham Authority v The Borneo Company (Malaysia) Sdn Bhd* [1975] 2 MLJ 80; [1975] 1 LNS 125 (FC); *Song Lian Chye & Ors v Tai Kain Cheong t/a Tai Kian Cheong & Co* [1983] 2 MLJ 222; [1983] 2 CLJ 128 (FC); *Chong Sui Chuen v Yuen Lai Chun* [1988] 1 LNS 28 (SC); *Capital Insurance Bhd v Cheong Heng Loong Goldsmiths (KL) Sdn Bhd* [2005] 6 MLJ 593; [2005] 4 CLJ 1 (FC); *UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785 (FC); *Mohamed Ismail bin Mohamed Shariff v Zain Azahari bin Zainal Abidin & Ors* [2013] 2 MLJ 605; [2013] 2 CLJ 717 (FC). As we have mentioned earlier above, we cannot fault the reasoning applied. F G H I

[14] We agree that in the absence of a finding of fraud, limitation applied.

A We note further that without the inferences of fact sought and relied upon by the appellants, their cause of action necessarily fails.

[15] We, therefore, dismiss the appeal, affirm the decision of the High Court, order costs, as agreed, in the sum of RM100,000 here and in the High B Court, and order that the deposit be refunded to the appellants.

Appeal dismissed.

C Reported by Ashok Kumar

D

E

F

G

H

I